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# Quarterly Synopsis of Florida Cases

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# QUARTERLY SYNOPSIS OF FLORIDA CASES

## PUBLIC LAW \*

**CONSTITUTIONAL LAW. *Zoning.*** Classification of particular property by municipal zoning ordinance must be reasonable. It must have some reasonable relation to the public welfare and also to the uses to which the property may reasonably be adapted. Applying this general rule, the court held a zoning ordinance unconstitutional because it arbitrarily changed the classification of specified property from "industrial" to "residential."<sup>1</sup> The property in part bordered railroad tracks, the industrial classification had existed for twenty years previously, and the change in classification reduced the value of the property from sixty to seventy-five dollars per front foot to five to seven dollars per front foot. These facts seem sufficient to justify the result.

***Recovery of Attorneys Fees.*** The court upheld the constitutionality of a statute authorizing recovery of an attorney's fee by a successful claimant in a summary proceeding to enforce a laborer's lien against real or personal property where the laborer was in privity with the owner of such property. It held that the classification of these types of wage claims was not arbitrary.<sup>2</sup>

***Taxation.*** A municipal ordinance imposing a tax of ten per cent on gross admission to theatres (exclusive of federal tax) was held to be outside the scope of the municipal authority to levy license taxes.<sup>3</sup> It was stated that the tax was unreasonable and confiscatory within the Florida rule that a tax for revenue purposes may be so burdensome in amount that it is unconstitutional. The suit challenging the tax was brought before any experience with its effect on the theatre business was had, and the result was reached on the basis of allegations that the tax on the taxpayer would total \$94,000—an increase of 12,000 per cent over previous license taxes; that the tax would be in excess of the net income of five of the taxpayer's theatres; and that it would constitute such a drain on the receipts of others as to discourage their operation. The court rejected a line of cases in other states holding that before the tax can be successfully challenged, experience with its effect must be had. On the basis of the above facts it thought that no argument was required to establish that the tax was unreasonable and stated that "No business can withstand

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\* This section of the SYNOPSIS covers the cases in 42 So.2d No. 12 through 43 So.2d No. 7.

1. *West Palm Beach v. Edward U. Roddy Corp.*, 43 So.2d 709 (Fla. 1950).

2. *Hunter v. Flowers*, 43 So.2d 435 (Fla. 1949).

3. *St. Petersburg v. Florida Coastal Theatres, Inc.* 43 So.2d 525 (Fla. 1949).

such an imposition." However, if the principal facts were stated in the opinion, the court's conclusion does not appear to be inevitable. In judging the reasonableness of the amount of a tax before the tax is levied, the court, as in this case, sets itself up as an economic prognosticator and makes a difficult and uncertain prediction of the future success of a business the basis for judging the validity of a tax. If Florida is not to follow the rule applied by the federal courts under the Fourteenth Amendment of the Federal Constitution,<sup>4</sup> it would appear that it should not prejudge the effect of the tax except in the clearest case.

A municipal ordinance which required a greater license tax of transient solicitors of photographs than of local photographers was held to be an undue burden on interstate commerce on activities of an out-of-state photography company.<sup>5</sup> The plaintiff challenging the tax was a photography company with head offices in Alabama. It sent its agents to the municipality to solicit photographs to be taken and to collect a small deposit. These agents were followed up by traveling photographers who took the pictures as ordered and collected an additional deposit. They sent the film to Alabama for development of proofs and after development the proofs were then sent back to the traveling solicitors who met with the customers, and took orders for any of the pictures from proofs they wished finished. The proofs were made up into pictures in Alabama as ordered and the pictures were sent C.O.D. to the customers. The court held these activities were entirely in interstate commerce and followed the "drummer" cases in the United States Supreme Court.<sup>6</sup> The trial court had held that the photographing was a sufficient local incident for justification of the license tax on the activities of the traveling photographers, but the supreme court application of the most recent opinion in the United States Supreme Court appears correct.<sup>7</sup>

**MUNICIPAL CORPORATIONS. Disannexation.** Referring to a case commented on in a previous *QUARTERLY SYNOPSIS*,<sup>8</sup> the court recently applied the rule that land cannot be disannexed by quo warranto proceeding if it is susceptible of municipal benefits commensurate with benefits conferred on other property located within the municipality.<sup>9</sup>

**Municipal Bonds.** Two important cases concerning issuance of bonds by counties are pertinent to issuance of bonds by municipalities and are therefore treated in this section. They concern the application of § 6, Article 9 of the constitution which requires a vote of freeholders of a political unit before public debt is incurred and bonds are issued by the unit. A number of cases

4. *A. Magnano Co. v. Hamilton*, 292 U.S. 40 (1934).

5. *Olan Mills Inc. of Alabama v. Tallahassee*, 43 So.2d 521 (Fla. 1949).

6. *Nippert v. City of Richmond*, 327 U.S. 416 (1946).

7. Note 5, *supra*.

8. *Smith v. Montverde*, 38 So.2d 135 (Fla. 1948); 3 *MIAMI L.Q.* 434 (1949); See Comment, *Legal Aspects of Municipal Incorporation*, 4 *MIAMI L.Q.* 78, 91 (1949).

9. *State ex rel. Watson v. Busbee*, 43 So.2d 7-11 (Fla. 1949).

indicate that the constitutional provision does not cover issuance of bonds for current governmental necessities or requirements of the governmental unit when payable within budgetary requirements authorized by law, even though the plan for the issuance of such bonds pledges the general credit of the political unit and its general powers of taxation in the sense that liens might be created against the lands in the political unit. The general words of the constitutional provision do not indicate any such rule, but it was apparently adopted to ensure that current necessary governmental activities of political units would not be endangered in case they could not be financed by funds at hand. Pursuant to this rule the court has approved issuance of securities by counties without a vote of freeholders for construction of a county jail,<sup>10</sup> a county courthouse,<sup>11</sup> and an auxiliary county court house.<sup>12</sup> But the building of a library by a city is not such a function.<sup>13</sup>

In a recent case the court also disapproved payment of certificates of indebtedness by ad valorem taxes authorized by the statute when the certificates were issued to secure rights of way for a state highway.<sup>14</sup> The court emphasized the absence of any claim that such activity constituted an essential function of the county government. But in contrast the court approved the issuance of securities to finance the purchase of land for enlarging and improving the Miami International Airport, although such securities were issued without a vote of freeholders and were to be paid by ad valorem taxes to the extent that other means of payment were not sufficient.<sup>15</sup> If the securing of rights of way for a state highway or the building of a public library are not to be considered essential governmental requirements of the county within the rule, then it could be urged that securing of land to make necessary improvements of a county airport should not be classified as such a function. That the court experienced some difficulty in reaching its conclusion is indicated by the fact that there were three majority opinions and one dissenting opinion. Each of the majority opinions emphasized the importance of the airport to the economic welfare of the county and the necessity of the acquisition of the land to the continued efficient functioning of the airport. The unique position of the airport in this respect was said to make it an essential function of government. The fact that no taxpayer challenged the transaction was also mentioned.

This case was cited as the basis for a per curiam opinion handed down on the same day.<sup>16</sup> In this third case (two justices dissenting) the court ap-

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10. *Tapers v. Pichard*, 124 Fla. 549, 169 So. 39 (1936).

11. *Posey v. Wakulla County*, 148 Fla. 115, 3 So.2d 799 (1941).

12. *State v. Pinellas County*, 160 Fla. 549, 36 So.2d 216 (1948).

13. *Bessmer Properties, Inc., v. Miami* 41 So.2d 551 (Fla. 1949).

14. *Yon v. Orange County*, 43 So.2d 177 (Fla. 1949).

15. *Seaboard Air Line R.R. v. Peters*, 43 So.2d 448 (Fla. 1949). The court held that the project approved involved a county purpose within constitutional limitations.

16. *State v. Miami*, 43 So.2d 457 (Fla. 1949).

proved the issuance of revenue bonds by the City of Miami to enlarge city buildings (including an auditorium) at Dinner Key, to retire indebtedness incurred in the original purchase of such property, to build a marina, and to improve a city park by enlarging an auditorium and recreation hall, by extending public docks, and by widening a yacht basin. The dissenting opinion indicates that under the financing plan the certificates would have to be paid from general city revenues if revenues from the property proved insufficient.

These cases may greatly enlarge the concept of essential governmental functions as outlined in previous cases. In deciding whether a particular project involves such a function it may be that the fact the project is important to the economic life of the political unit together with the fact that it involves necessary expansion or improvement of already existing facilities will be decisive. The importance of absence of objections by taxpayers is not clear. In future cases, however, each of the above cases can easily be limited to its special facts and the scope of the old rule is now left in doubt.

The Miami financing plan in the above case also included a provision for payment by the city of reasonable rental value of Dinner Key buildings owned by the city and to be occupied by the city into the special fund for the retirement of the certificates. The dissenting opinion approved this feature.

In two other cases which were clearly governed by previous decisions the court approved the issuance of municipal special obligation bonds without a vote of freeholders.<sup>17</sup> The court also decided that in the absence of a statutory provision for public sale of municipal special obligation bonds, such bonds may be sold at private sale.<sup>18</sup> Statutory provisions for public sale of general bonds were not considered pertinent.

**TAXATION. *Tax Deeds.*** Previous cases indicating generally that a tax deed description is sufficient if it establishes without confusion the identity of the property covered were followed in a recent case.<sup>19</sup> The description of the deed in the case referred to a block in Dania, but the block referred to was clearly not contained in any plat of the city of Dania. It was referred to in a plat of a predecessor town, Modello. In view of all of the facts, the court thought confusion was created by the description.

**CRIMINAL LAW. *Extradition.*** When a rendition warrant recites that a copy of the indictment found or affidavit made before a magistrate certified by the governor of the demanding state has been filed with the governor, it is

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17. *State v. Daytona Beach*, 42 So.2d 764 (Fla. 1949); *State v. Pensacola*, 43 So.2d 340 (Fla. 1949).

18. *State v. Daytona Beach*, 42 So.2d 764 (Fla. 1949). In *Martin v. Board of Public Instruction of Broward County*, 42 So.2d 712 (Fla. 1949) the court held that particular statutory and charter provisions did not authorize the City of Fort Lauderdale to sell a tract of land to the Board of Public Instruction by private sale.

19. *Sanford v. Major Dania, Inc.*, 43 So.2d 712 (Fla. 1949). Although the tax deeds were issued under a statute with a defective title, this defect was held to be cured by a later statute validating taxes assessed under the first statute.

prima facie evidence of such fact.<sup>20</sup> In a recent appeal from an order in a habeas corpus proceeding, such a recital in the rendition warrant was challenged on the basis of stipulated facts. However, the court took judicial notice of the record of the extradition proceedings before the governor, from which it appeared that a properly certified affidavit had been submitted to him.<sup>21</sup>

Three additional cases concerning criminal procedure will be reviewed in the next issue of the Synopsis.

ROBERT MEISENHOLDER  
PROFESSOR OF LAW

PRIVATE LAW \*

**CONTRACTS. Action on judicial bond.** When action is brought on surety bonds filed in judicial proceedings, there appears to be some confusion between the view that the liability of the surety is a matter of contract, determined by a construction of the bond, and the view that the liability of the surety is determined by the statute or rule of court under which the the bond is exacted. In a current action<sup>1</sup> on a *ne exeat* bond, required in proceedings for the support of a wife, the court denied liability of the surety to pay the support order, the bond being conditioned only upon the appearance of the husband; while in an action on a *supersedeas* bond, the court disregarded specific provisions of the bond relating to counsel fees, and held that all conditions not prescribed by the statute were surplusage.<sup>2</sup> The appellate court in the first case assumed that the trial court could have prescribed a bond conditioned both upon appearance and payment of the ultimate award. At risk of barratry, we wonder if the appellant in the second case would have a cause of action to recover unearned premiums? The matter, in our opinion, should be regarded as one of adjectival law, as it was in the second case, rather than one of contract.

**Negotiable instruments.** While in the hands of the original payee, a negotiable instrument is subject to personal as well as real defenses; that is to say, defenses which are cut off by negotiation are still available to

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20. *State ex rel. Peck v. Chase*, 91 Fla. 413, 107 So. 541 (1926).

21. *Schrivver v. Tucker*, 42 So.2d 707 (Fla. 1949). Where there is an assault with intent to commit rape, abandonment of purpose because of an emission does not meet the requirements of the defense of voluntary desistance without outside interference or unusual resistance. This decision is satisfactory. *Roundtree v. State*, 43 So.2d 12 (1949) In *Hurley v. State*, 43 So.2d 179 (1949) reversed a conviction of manslaughter on the ground that the evidence was not sufficient to support the judgment.

\* The cases reviewed in this section are found in Volume 43, SOUTHERN REPORTER (SECOND SERIES) ending with the advance sheets issued February 16, 1950 (No. 7).

1. *Lieberman v. Lieberman*, 43 So.2d 460 (Fla. 1949).

2. *Bernstein v. Bernstein*, 43 So.2d 356 (Fla. 1949).

the maker. Under plea of payment, the maker can offer in evidence the original contract of sale under which the note was given, to prove that the agent who negotiated the contract had implied authority to receive payment.<sup>3</sup> Payment to the authorized agent of a holder is sufficient to discharge a negotiable instrument, and agency is a matter of fact to be proved by competent evidence. The parole evidence rule has no application in such situations. In disposing of cases in commercial law, the Supreme Court of Florida is committed to the doctrine that it will apply the standards of the common man, who may or may not be different from the merchant, banker or broker who normally engages in commercial transactions.<sup>4</sup>

*Construction of contract (lease).* The construction of a contract or a conveyance is a question of law for the court. The terms of a contract are a question of fact for the jury, but the parole evidence rule makes a written contract or conveyance the only admissible evidence of its terms. Parole evidence may be considered when there is ambiguity, or in cases of reformation to prove that the written contract does not represent the actual agreement. In the light of these rules, we find difficulty in understanding a current case<sup>5</sup> in which declaratory judgment proceedings were had to determine whether or not a lease executed in 1942 "for the duration of the national emergency now existing" was still in effect. The lower court disposed of the case on a motion to dismiss.<sup>6</sup> The appellate court reversed, holding that the petition stated a cause of action to which an answer would be required. What could be produced under such an answer within the parole evidence rule, except evidence of circumstances which the court already knows judicially, is beyond our comprehension. The general trend of cases construing the phrase, "duration of the war," is to construe non-technically in the case of contracts between private parties, making the end of hostilities or demobilization the test, and technically in the case of statutes, making nothing short of a treaty of peace suffice.<sup>7</sup>

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3. This evidence was excluded by the trial court, apparently on the theory that the negotiable instrument embodied the whole contract, or that payment in due course can be made only to the holder personally. The former proposition would have been true if the instrument had been negotiated. The action was by a corporation, payee of a note. The maker offered in evidence cancelled checks payable to and indorsed by the president personally. The trial court excluded the contract, which apparently would have shown that the notes were given for merchandise purchased and that it was executed in behalf of the corporation by its president. *Posey v. Hunt Furniture Co.*, 43 So.2d 343 (Fla. 1949).

4. Terrellism: "The judge works with the implements and tools of the common man and it therefore follows that, he should use the standards of the common man in the disposition of his causes." 43 So.2d 343, 4 (Fla. 1949).

5. *Syndicate Gramercy v. Daoud*, 43 So.2d 334 (Fla. 1949).

6. We construe the motion to dismiss as a demurrer raising questions of law, and the granting of the motion as a finding that the lease had not expired. If that is its effect, the trial court may have erred in the form of its decree, which should have declared the lease to be effective, and the case should have been treated as one of procedure.

7. See Riggs and Updike, *Real Property*, 1946 ANNUAL SURVEY OF AMERICAN LAW 894 (1947).

PROPERTY. *Joint bank accounts.* Florida has at last<sup>8</sup> cut the Gordian knot and determined that the opening of a joint bank account, payable to either party or the survivor, creates without more a "joint tenancy" with *jus accrescendi*, a position which it had previously refused to take.<sup>9</sup> We have recently noted that an ownership of personal property by husband and wife as tenants by the entirety is recognized,<sup>10</sup> in spite of the fact that before the emancipation of married women such a form of ownership would have been impossible. Similar considerations apply with respect to joint tenancy, this being a form of tenure primarily of real property. Possession and title are so closely related in the concept of personalty that unless the person having possession be regarded as a bailee, trustee or agent for his co-owner or owners, practical difficulties are encountered. While the statute<sup>11</sup> on which the court relied applies specifically to the construction of conveyances and legacies of personal as well as real property, it has never before been regarded as controlling.<sup>12</sup> Other courts have not found the problem so easy of solution.<sup>13</sup> While admitting that a joint tenancy with right of survivorship may be created in intangible personal property if the debtor's contract is made payable to both, they find power in either party to receive payment inconsistent with joint ownership. Furthermore, the mere opening of a joint account with a bank without transfer of power to receive payment, symbolized in the pass-book, demonstrates an intent to make a gift at a future time, like a Totten trust, the "poor man's will." That was the view taken by previous Florida cases, which were distinguished in the present as if holding another theory.<sup>14</sup> The new decision has at least the merit of simplifying what would otherwise be a difficult problem. It is to be noted that the case could have been decided under the statute relating specifically to such deposits.<sup>15</sup>

8. *Crabtree v. Garcia*, 43 So.2d 466 (Fla. 1949).

9. *Crossman v. Naphtali*, 160 Fla. 148, 33 So.2d 726 (1948). See Klein, *Personal Property*, 1948 ANNUAL SURVEY OF AMERICAN LAW 675 (1949).

10. *Rader v. First National Bank*, 42 So.2d 1 (Fla. 1949) discussed *supra*, p. 214.

11. FLA. STAT. § 689.15 (1941). The statute relates to devises, transfers and conveyances, but is specifically applicable to personal as well as to real property. It does not necessarily follow that the statute changed the common law rule with respect to personal property, as it most certainly did as to real.

12. *Crossman v. Naphtali*, *supra*; *Cerny v. Cerny*, 152 Fla. 333, 11 So.2d 777 (1943).

13. For the views currently entertained, and the frequency with which cases of this type have been before the courts in recent years, see 1946 ANNUAL SURVEY OF AMERICAN LAW 887 (1947); 1947 id. 846 (1948); 1948 id. 675 (1949).

14. Apparently on the theory that the language of the certificate of membership and the application in *Crossman v. Naphtali*, *supra*, when read and construed together, did not show the requisite intent, the view taken in a Case Comment, 1 U. OF FLA. L. REV. 462 (1948), which the court cited. The court in *Crossman v. Naphtali*, however, used this language: "... because John Novak never surrendered dominion." 160 Fla. 148, 150, 33 So.2d 726, 7 (1948).

15. FLA. STAT. § 653.17 (1941). Savings banks are authorized to pay the survivor and that payment is made a valid acquittance. This was construed as relating only to the discharge of the bank's liability, not to the depositor's title in *Cerny v. Cerny*, *supra*.



*Creditors' lien.* There are certain instances in which a person having rightfully obtained possession of the personal property of another, may retain possession until claims against the owner are satisfied. Specific examples are the common law liens of the carrier, innkeeper, factor or artificer, and the seller's lien. Except in such instances, a bailment cannot be converted into a mortgage or pledge simply because the owner has become indebted to the bailee. This principle found expression in a recent case<sup>16</sup> in which the Supreme Court of Florida held that a counterclaim for damages cannot be filed in an action of replevin. From a strictly procedural approach, the case may present some difficulty,<sup>17</sup> but when it is remembered that the effect of allowing the counterclaim would be to convert the bailee's unsecured claim into a pledge, the wisdom of the rule is at once apparent.

*Mechanics' liens.* A materialman may acquire a lien against real property where specially fabricated materials are not incorporated into the improvement or delivered on the premises. This can occur, however, only when the owner of the land or the lessee has prevented delivery, according to a recent case.<sup>18</sup> A general contractor does not have implied authority to act for the owner in this respect. Failure adequately to describe the real property is fatal to a claim of lien.<sup>19</sup> Where a lien cannot be asserted because the claim is defective, the circuit court cannot retain jurisdiction of foreclosure proceedings to enter a judgment for damages. A statute giving laborers a reasonable attorney's fee where it is necessary to resort to summary proceedings to enforce a mechanic's lien against property of the immediate employer, was held constitutional.<sup>20</sup>

*DECEDENTS' ESTATES. Estoppel to claim dower.* Until the time in which to file her election to take dower has expired, a widow is not absolutely estopped to claim dower by accepting benefits or taking property devised or bequeathed to her under her husband's will. She will be required, however, to account for what she has received, and there may be situations, difficult to conceive, in which she will be unable to restore what she has received and the estoppel be absolute. To hold the estoppel absolute in every instance would be to defeat the policy of the law which affords the wife the minimum of time in which to weigh the relative advantages of her legacy and her dower share. This decision,<sup>21</sup> in the light of the recent case of *Jones*

16. *Seven Seas Frozen Products v. Fast Frozen Foods*, 43 So.2d 181 (Fla. 1949).

17. Mr. Burnes has promised to criticize this aspect of the case. See *Adjectival Law*, *infra*.

18. *Lehigh Structural Steel Co. v. Joseph Langner, Inc.*, 43 So.2d 335 (Fla. 1949). Leases contemplated improvement by the lessees. A general contractor, employed by the tenant, ordered steel which was specially fabricated and retained at Bethlehem, Pa., awaiting his shipping instructions.

19. *Ibid.*

20. *Hunter v. Flowers*, 43 So.2d 435 (Fla. 1949).

21. *Griley v. Griley*, 43 So.2d 350 (Fla. 1949). Testator died domiciled in Florida.

*v. Niebergall*,<sup>22</sup> shows that the Supreme Court holds the view of that case, which we took, that while the constitutional and statutory provisions relating to homestead cannot be avoided by the application of the doctrine of estoppel, the party asserting rights under such circumstances must account for the benefits he has otherwise received.<sup>23</sup>

*Concurrent jurisdiction of probate and equity.* While the county judge has been given broad equitable powers in all cases involving the settlement of decedents' estates,<sup>24</sup> his jurisdiction is not exclusive. In this respect, Florida has not followed a modern trend.<sup>25</sup> For this reason, a bill to rescind a contract made prior to the death of the decedent may be maintained in the circuit court.<sup>26</sup> The court seems to have regarded the case as one involving an election of remedies. This might have been true if the complainant had filed a claim for breach of contract with the county judge and had then filed a bill in equity to rescind. The case does not necessarily decide that the county judge would have jurisdiction to entertain the bill for rescission, or that relief would be barred by failure to file a claim within the period of the statute of nonclaim.<sup>27</sup>

**PERSONS AND DOMESTIC RELATIONS.** *Collateral attack upon void marriages.* Not only is a marriage void when one party thereto is the husband or wife of a third person, but so also is a divorce and property settlement terminating such a relationship, according to a recent decision.<sup>28</sup> Because the marriage is wholly void, the marriage and the subsequent divorce are subject to collateral attack. While allowing the collateral attack, the Supreme Court of Florida treated the mortgage as voidable rather than

having disposed by will of property in Florida, Panama, and the Canal Zone. His widow filed an election to take dower and petitioned for assignment thereof. In his answer to the petition, the executor asserted that the widow had taken possession of property under the will in Panama and the Canal Zone, and had not offered to return it. An order striking the answer was reversed.

22. 42 So.2d 443 (Fla. 1949), discussed *supra*, p. 217.

23. On the first hearing, Barns, J., dissented, taking the view, which he also took, dissenting, in *Jones v. Niebergall*, that there was an absolute estoppel. When his opinion prevailed after re-argument, it was modified to hold that the widow was not estopped but was accountable for what she had received.

24. In *re Warner's Estate*, 160 Fla. 461, 35 So.2d 296 (1948), discussed in *Synopsis*, 2 *MIAMI L.Q.* 312 (1948).

25. MODEL PROBATE CODE § 6, in *SIMES AND BASYE, PROBLEMS IN PROBATE LAW* 46 (1946).

26. *Plasman v. Roach*, 43 So.2d 11 (Fla. 1949). Decedent entered into a lease, a partnership, and a stock purchase agreement with plaintiff. These were alleged to be voidable on some equitable grounds, the exact nature of which is not revealed. A bill to rescind, to impose a constructive trust, and for an accounting, was dismissed.

27. See *Wilson and McGeehee, Probate Claims in Florida*, 1 *U. OF FLA. L. REV.* 1 (1948). If the right of rescission is asserted defensively, it may not be barred. *Starke v. Pfender*, 146 Fla. 262, 200 So.2d 850 (1941).

28. *Beidler v. Beidler*, 43 So.2d 329 (Fla. 1949). Paul and Anne were married twice in 1940 and 1942, and were divorced twice in 1942 and 1946. Actually Anne was the wife of another, but Paul was in the merchant marine and was seldom at home. Suspecting his wife, Paul brought a bill for annulment, but this was dismissed with prejudice when he failed to produce evidence. He then obtained a divorce. The bill in the present case was predicated on the discovery of new evidence.

void in some other respects, charging the innocent husband with the support of the guilty wife, and refusing to make the wife account for the appreciation in value of real property purchased with the husband's money. The issues were involved in the review of a complicated accounting, and the mistake was doubtless inadvertent, particularly since the court declared soon after that the effect of voiding a marriage is to make the relationship meretricious from its inception.<sup>29</sup> Further evidence of ingenuity is found in the formula, that because there is a duty on the part of the guilty wife to disclose the existence of her spouse, it is unnecessary to offer specific proof of fraud. It is important to remember, however, that while the marriage may be void, a gift by the husband to his putative wife is a completed transfer of property and must be set aside for cause. Since the mistake is strictly one of law and not one of fact, it is necessary to show fraud or breach of a fiduciary relationship.

While the decisions are to the effect that a void marriage is subject to collateral attack, it is still necessary to frame the collateral action between proper parties. The second wife may not attack the first divorce, but she may sue for an annulment of the second (void) marriage or to enjoin her illegitimate husband from demanding access to her bed and board. Where there is no jurisdiction to annul a marriage because neither party is domiciled within the state, recourse to declaratory judgment proceedings as a subterfuge will be prevented. The ubiquitous State, third party to every divorce, may not be invoked by the plaintiff to cure the defect. The court chose a novel way to express its disapproval, rephrasing the well-known maxim thus: Equity will not permit a plaintiff to soil his clean hands. All this was presented in a case which, because of the notoriety of the parties and the curiosity of the public, was bound to be the hard case which makes bad law.<sup>30</sup>

*TORTS. Negligence: duty with respect to children on highway.* In a recent case, originating in an action by the parents for the death of a three-year-old child, killed while crossing a highway, the court found the evidence sufficient to support the findings of the jury that the driver was negligent and that the person to whom custody of the child had been entrusted was not guilty of contributory negligence; but stated some interesting rules of law: one, that anyone who runs over a child in the highway without know-

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29. *deMarigny v. deMarigny*, 43 So.2d 442 (Fla. 1949). Obviously the court does not place the same construction upon the word "meretricious" (from *merere*, to work for hire) that we do. It may confuse the rule that a relationship meretricious in its inception cannot ripen into a common law marriage.

30. *deMarigny v. deMarigny*, 43 So.2d 442 (Fla. 1942). The first divorce was obtained in Florida while the parties, nationals of foreign states, were in the United States as alien visitors on temporary visas, which would show fraud upon the Florida court. The court would not permit the plaintiff to waive the protection of the decree because that would be to brand her as a prostitute; but it suggested that a solution be sought in another jurisdiction. Plaintiff did not claim to be a resident of Florida!

ing what has happened, is driving too fast; another, that a three-year-old child is incapable of contributory negligence; another, that the adult custodian is not required to walk the child on a leash; and again, that the safe rate of speed varies with the character of the area traversed.<sup>31</sup>

*Damages.* The elements of damage to be recovered in an action by parents for the death of a child are recompense for parental pain and suffering and loss of the child's prospective services until majority. The court might also have included medical and funeral expenses which the parents have met. The jury is the best judge of the value of the first two elements, which are not readily susceptible of mathematical proof. The court found it impossible, while admitting that five thousand dollars would have been excessive when Mr. Justice Terrell was called to the bar, to say that \$55,000 was too much. This was not predicated upon the depreciation of the value of money as in recent cases, but upon the appreciation of the ability of the medical profession to measure the extent of the effects upon the physical and mental well-being of the victim of a serious emotional shock: truly atomic jurisprudence. One cannot help feeling, with the dissenting justice, that the verdict was the result of prejudice and sympathy.<sup>32</sup>

*Workmen's compensation.* The workmen's compensation law provides that a workman is not entitled to compensation when injury has been occasioned primarily by the employee with willful intent to injure or kill himself. This does not prevent recovery where an employee died by suicide as the result of an uncontrollable impulse caused by the pain resulting from an otherwise compensable injury. While this rule appears to be settled, the exact role of the appellate court in a recent case seems to be mistaken.<sup>33</sup> The deputy commissioner, who found against the widow, evidently found that the mental condition of the deceased was such that the suicidal act was willful and intentional and not the result of an uncontrollable impulse. The Supreme Court apparently substituted its own finding of fact rather than ruling as a matter of law that the evidence did not support the deputy commissioner's finding. The case was undefended, and the public will in the end absorb the cost; but we have already seen the hardship on the workman which may occur when failure to observe the usual limits on the scope of review results in a decision adverse to the workman.<sup>34</sup>

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31. *Winner v. Sharp*, 43 So.2d 634 (Fla. 1949).

32. *Winner v. Sharp*, 43 So.2d 634 (Fla. 1949).

33. *Whitehead v. Keene Roofing Co.*, 43 So.2d 464 (Fla. 1949).

34. See Lester Harris, *Appeals in Workmen's Compensation Cases*, 2 MIAMI L.Q. 215 (1948).

## PROCEDURE \*

**APPEAL. Law of the Case.** In an appeal from a final decree in a mortgage foreclosure suit rendered pursuant to a mandate upon a previous appeal,<sup>1</sup> the court admitted that its decision on the previous appeal was erroneous in allowing the mortgagor a credit; the allowance of such credit was based on the erroneous assumption, drawn from the record, that the mortgagee was in possession of all the mortgaged property, whereas such possession was in fact controversial.<sup>2</sup> The application of the rule of the "law of the case," which has been defined "as the points adjudicated by an appellate court upon a writ of error or upon appeal and are no longer open for consideration,"<sup>3</sup> may be relaxed. "The court is not bound at the will of litigants to revise its previous holdings, but, when itself convinced that it should, it can."<sup>4</sup>

**Supersedeas Bond.** An illegal or improperly required condition of liability in a supersedeas bond will be regarded as surplusage and ignored. In *Bernstein v. Bernstein*<sup>5</sup> a suit for separate maintenance and an adjudication that certain realty had been conveyed in fraud of the marital rights of the plaintiff-appellee, by a final decree the plaintiff-appellee was awarded a pecuniary sum for separate maintenance and an order that the realty be sold to satisfy payment of such sum, the conveyance having been adjudged fraudulent. One of the two defendants—appellants, the transferee of the realty, appealed that part of the decree respecting the fraudulent conveyance and, in order to stay the order of sale, posted a supersedeas bond "conditioned to pay to the plaintiff . . . all costs, damages and expenses, including attorneys' fees which may be incurred by the [plaintiff] in the event said appeal is dismissed or the cause affirmed by the Supreme Court." The supreme court affirmed the decree of the lower court, and the realty was sold for a sum appreciably more than the decretal award. Thereafter, the plaintiff-appellee recovered a judgment on the supersedeas bond against the defendants—appellants, the principal and surety thereof, for attorneys' fees and interest accruing on the pecuniary decree as a result of the appeal by the defendants-appellants. It was from that judgment the present appeal was prosecuted. The court held it error to exact an appeal bond conditioned to pay such attorneys' fees, and therefore such condition was ineffective and superfluous. It was further held to be error to require defendants-appellants to pay the interest on the final decree accruing after the appeal was taken thereon, since the spouse against whom the personal, final, pecuniary decree was rendered would be required to pay such interest; plaintiff-appellee would not be permitted

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\* The cases reviewed in this section are found in Volume 43 nos. 1 through 8.

1. *Joyner v. Bernard*, 160 Fla. 681, 36 So.2d 364 (1948).

2. *Bernard v. Joyner*, 43 So.2d 901 (Fla. 1949).

3. Note 1 *supra* at 365.

4. *Seagraves v. Wallace*, 69 F.2d 163 (5th Cir. 1934).

5. 43 So.2d 356 (Fla. 1949).

two recoveries; and therefore, the provision in the bond respecting interest was also ineffective and superfluous.

**COUNTERCLAIM. Joinder of forms of action.** In *Seven Seas Frozen Products v. Fast Frozen Foods*,<sup>6</sup> an action in replevin, a demurrer to a compulsory counterclaim sounding in contract was sustained on the ground that the statute on joinder of forms of action<sup>7</sup> forbids joining replevin with other forms of action. The statute regarding compulsory counterclaims requires the defendant to "state as a counterclaim, any claim, whether the subject of a pending action or not, which he has against the plaintiff, arising out of the transaction or occurrence that is the subject matter of the action. . . ." <sup>8</sup> The counterclaim statute, which is broad indeed, was deemed to be in "apparent conflict" with the joinder statute, and the court applied a rule of statutory interpretation—that the specific, the joinder statute, controls the general, the counterclaim statute. The court observed that the purpose of the joinder statute would be destroyed if the filing of counterclaims were allowed, since it would inject into the trial issues of an entirely different nature.

The "apparent conflict" between the two statutes seems illusory, since the joinder statute, passed in 1861,<sup>9</sup> obviously referred only to plural counts in the plaintiff's declaration; only recoupment and set-off were then extant; the counterclaim statute was passed in 1941.<sup>10</sup> Moreover, even if the statutes do conflict, the rule of statutory interpretation which the court conveniently applied is hardly a revelation of the legislative intent which, in passing the compulsory counterclaim provisions, was directed—as the court recently stated in *Newton v. Mitchell*<sup>11</sup>—toward the end of "expedition and economy so that claims originating in a single happening may be tried and determined in one action." It seems this decision is predicated on considerations other than procedural propriety.<sup>12</sup>

**DECLARATORY JUDGMENT. Parties and subject matter.** In *deMarigny v. deMarigny*<sup>13</sup> the appellant-petitioner married one of the appellees-respondents subsequent to a decree of divorce dissolving the marriage of the appellees-respondents. In a suit from which an appeal and petition for a writ of certiorari were taken to the supreme court, the appellant-petitioner sought a declaratory judgment for a determination of the force and effect of the decree, which was valid in every respect on the face of the record. The petitioner's bill alleged that a fraud had been perpetrated on the circuit court in

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6. 43 So.2d 181 (Fla. 1949).

7. FLA. STAT. § 46.08 (1941).

8. FLA. STAT. § 52.11(1) (1941).

9. Fla. Laws 1861, c. 1096, § 12.

10. Laws 1941, c. 20426, § 6.

11. 42 So.2d 53 (Fla. 1949).

12. Stephenson, *Quarterly Synopsis*, 4 MIAMI L.Q., 219 (1950).

13. 43 So.2d 442 (Fla. 1949).

the divorce suit in that when the suit was instituted the plaintiff and defendant were foreign nationals and the plaintiff had not resided in Florida for more than ninety days preceding the commencement of the suit. The question before the court was whether the statute respecting declaratory judgments and decrees<sup>14</sup> embraces a determination of the validity of such a decree.

The court applied the principle of *ejusdem generis* and concluded that such a determination was not within the scope of the statute. "The words 'or other article, memorandum or instrument in writing' are limited by the words 'or by a municipal ordinance, contract, deed, will, franchise.' In other words, the 'instrument in writing' should be the same kind of class as those instruments which are specifically enumerated and such phrase connotes only instruments of the same class or variety. . . . Neither a 'judgment' nor a 'decree' of a court of competent jurisdiction can be said to be similar to 'a municipal ordinance, contract, deed, will, franchise.'"<sup>15</sup>

As a second string to its bow the court said that even if the statute expressly included a determination of the validity of a decree, a declaratory judgment proceeding is not an appropriate method of questioning a decree unless it "has become the source of definite rights and is unclear or ambiguous."<sup>16</sup> This decree was clear and unambiguous.

The court added, "Our declaratory decree statute is no substitute for established procedure for review of final judgments or decrees. Nor is it a device for collateral attack upon them."<sup>17</sup>

JUDGMENTS. *Collateral attack*. Another question before the court in the *deMarigny* case was whether the appellant-petitioner could maintain her bill as an independent bill in equity. The court based a negative answer upon the fact that this proceeding was a collateral attack, at most a voidable divorce decree, the validity of which would have to be impeached by matters *dehors* the record; a collateral attack may not be based on such matters.

The court further said appellant-petitioner had no standing to bring this action because neither party to a divorce proceeding can impeach the decree, and even if appellant-petitioner is considered to represent the state as an interested third party which is not foreclosed to impeach the decree, it is in the best interests of society not to upset the decree. To do otherwise

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14. FLA. STAT. § 87.02 (Cum. Supp. 1947). The Statute states: "Any person claiming to be interested or who may be in doubt as to his right under a deed, will, contract or other article, memorandum or instrument in writing or whose rights, status or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise or other article, memorandum or instrument in writing may have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum or instrument in writing, or any part thereof, and obtain a declaration of rights, status or other equitable or legal relations thereunder."

15. *deMarigny v. deMarigny*, 43 So.2d 442, 444 (Fla. 1949).

16. *Ibid.*

17. *Id.* at 445.

would be a declaration that appellant-petitioner lived in adultery with appellee-respondent whom she married; moreover, it would encourage any party to a fraudulent divorce decree, valid on the face of the record ". . . to conspire with another person to enter into a marriage with him or her with the sole purpose in mind of having said spouse thereafter bring a proceeding to impeach the divorce decree and thus accomplish indirectly, by means of such conspiracy and fraud, that which could not be accomplished directly."<sup>18</sup>

The court stated, moreover, that since the divorce decree had not adversely affected the status of appellant-petitioner's rights existing at the time of entry of the divorce decree—for she occupied no status and had no rights at that time—she as a stranger to the suit was not entitled to impeach the decree.

**JURISDICTION.** *Appellate.* The court intentionally filled a gap in our appellate jurisdiction. Appeals lie from the small claims courts to the circuit courts under Florida Statutes, 1941, chapter 61<sup>19</sup> although that chapter only pertains to appeals from county courts, county judges' courts and justice of the peace courts, and chapter 21915, Acts of 1943, which created the small claims courts, makes no provision for appeals therefrom.<sup>20</sup> The decision was based on the fact that the jurisdiction of the small claims courts and the justice of the peace courts is coordinate.

*Courts.* A complainant who seeks relief on a cause of action for equitable relief, a portion of which can be procured in the probate court, may at his option avail himself of the more adequate, direct and expeditious remedy afforded by a court of equity rather than be restricted respecting such portion to the probate court. Hence, in *Plasman v. Roach*<sup>21</sup> where a bill of complaint which was filed against the defendant individually, and as administrator of an estate, stated a good cause of action over which a court of equity has jurisdiction, it was proper for the plaintiff to proceed in that court.

*Transference of action.* A circuit court judge transferred *sua sponte* an action at law pending in the Circuit Court of Dade County to the Civil Court of Record of Dade County because the jurisdictional amount of the action lay within the jurisdiction of the latter court rather than the former. There is no constitutional or statutory provision vesting the Circuit Court of Dade County with power to transfer such a case to an inferior court for further proceedings, and, therefore, the circuit court judge should have ordered the action dismissed.<sup>22</sup>

**MOTION FOR NEW TRIAL.** *Howland v. Cates*<sup>23</sup> emphasizes the importance

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18. *Id.* at 446, 447.

19. Chapter 61 provides that judgments of certain courts will be reviewed by appeal, the manner of which being set forth therein.

20. *Sachs v. Lalumera*, 43 So.2d 342 (Fla. 1949).

21. 43 So.2d 11 (Fla. 1949).

22. *Caudell v. Leventis*, 43 So.2d 853 (Fla. 1949).

23. 43 So.2d 848 (Fla. 1949).



of complying with procedural requirements in moving for a new trial. In accordance with the apposite statute,<sup>24</sup> the plaintiff within four days after the rendition of an adverse verdict and during the same term, applied for and was granted the maximum extension of time—fifteen days—to make and present a motion for a new trial. In such cases of extension of time, a copy of the motion to be presented to the judge must be served on the opposite party, or his attorney, with three days' notice of the time and place that the motion will be presented and heard. The plaintiff did not serve a copy of his motion on the defendant until the day of presentation of the motion, the fifteenth day. Thus, the trial court properly allowed defendant's motion to strike plaintiff's motion for a new trial.

**MOTION TO STRIKE.** The relevancy or materiality of allegations is the proper test to be applied in ruling on a motion to strike allegations from an answer in the probate court—a test which has its counterpart in courts of equity. In *Griley v. Griley*<sup>25</sup> the testator's widow filed a petition specifying her election to take dower, and the executor filed an answer in which he alleged that prior to the filing of said petition the widow had taken possession of certain property in Panama which was devised to her under the decedent's will. While taking possession of such property may not work an estoppel to make an election to take dower, such fact is at least to be considered in setting off and making an allotment of dower; it is, therefore, pertinent to the petition and should not be stricken.

**PROCESS.** The constitutionality of the procedure of the newly created civil claims court<sup>26</sup> was upheld.<sup>27</sup> It was contended *inter alia* that the notice to the defendant required under the act creating the court made no provision that such notice run in the name of the State of Florida, a state constitutional requirement.<sup>28</sup> The court held that the constitutional provision referred "only to that character of process which under the common law would run in the name of the King," and it was not convinced that the notice required by the act is within that class. However, the court went on to say that even if the notice fell within that class, the notice taken with the "Statement of claim" is ample to meet the constitutional requirement. It went on to advance a third reason to substantiate its holding: The civil claims court has "ample power to correct the notice and statement in such manner as may be necessary to make it conform to legal requirements."<sup>29</sup>

Further, the court upheld the manner of service of process in the civil claims court. Service of process by registered mail where proof of receipt

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24. FLA. STAT. § 54.24 (1941).

25. 43 So.2d 350 (Fla. 1949).

26. Laws of 1949, Chapter 25575.

27. State *ex rel.* Murphy-McDonald Builders' Supply Co. v. Parks, 43 So.2d 347 (Fla. 1949).

28. FLA. CONST. Art. V, § 37.

29. Cf. *Gilmer v. Bird*, 15 Fla. 410 (1875).

thereof is shown is not violative of due process of law since the notice is as effective to advise the defendant of the charge or claim against him as if made and shown by a sheriff's return.

*TRIAL. Jury.* In rejecting another contention of unconstitutionality in the *Murphy-McDonald* case, that the requirement that a person demanding a jury trial in the civil claims court deposit with the judge or his clerk a sum of money in the amount the judge fixes as reasonable to secure the payment of costs incurred by reason of the jury trial, the court said, "Costs should not be such as to make it difficult or impossible to secure a jury but we think the court has the discretion to fix costs in such manner as to prevent this."<sup>30</sup>

*Objection to instruction.* It is important to distinguish between an instruction and a charge. During the course of the trial the plaintiff placed in evidence, over defendant's objection, a certain paper. After all the evidence was in but before the argument of counsel and the court's charge on the law, the trial court instructed the jury that the ruling on the admission of such evidence was reversed and that the jury should disregard it. The plaintiff did not object to the instruction. While the appellate court may review "without exception having been taken at the trial, any question of law involved in any adverse . . . instruction . . . the party complaining must object prior to such instruction being given."<sup>31</sup> It is not necessary, however, to object to the giving of a charge by the court.<sup>32</sup> Since the judge's statement to the jury constituted an instruction, the plaintiff by failing to object lost his right to a review thereof on appeal.<sup>33</sup>

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30. See note 27 *supra* at 349.

31. FLA. STAT. § 59.07(1) (Cum. Supp. 1947).

32. *Id.* at § 59.07(2).

33. *Howland v. Cates*, 43 So.2d 848 (Fla. 1949).